File Number: 29146

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

NORM RINGSTAD, in his capacity as the Project Assessment Director for the Tulsequah Chief Mine Project, SHEILA WYNN, in her capacity as the Executive Director, Environmental Assessment Office, THE MINISTER OF THE ENVIRONMENT, LANDS AND PARKS and THE MINISTER OF ENERGY AND MINES AND MINISTER RESPONSIBLE FOR NORTHERN DEVELOPMENT

APPELLANTS
(Appellants/Respondents on Cross Appeal)

AND:

THE TAKU RIVER TLINGIT FIRST NATION and MELVIN JACK, on behalf of himself and all other members of the Taku River Tlingit First Nation

RESPONDENTS
(Respondents/Appellants on Cross Appeal)

AND:

REDFERN RESOURCES LTD.

RESPONDENT
(Appellant/Respondent on Cross Appeal)

AND:

The ATTORNEY GENERAL OF CANADA, the ATTORNEY GENERAL OF QUEBEC, the UNION OF BRITISH COLUMBIA INDIAN CHIEFS, the FIRST NATIONS SUMMIT, the BUSINESS COUNCIL OF BRITISH COLUMBIA, BRITISH COLUMBIA & YUKON CHAMBER OF MINES, BRITISH COLUMBIA CHAMBER OF COMMERCE, BRITISH COLUMBIA WILDLIFE FEDERATION, COUNCIL OF FOREST INDUSTRIES, MINING ASSOCIATION OF BRITISH COLUMBIA, AGGREGATE PRODUCERS ASSOCIATION OF BRITISH COLUMBIA, DOIG RIVER FIRST NATION and the ATTORNEY GENERAL OF ALBERTA.

INTERVENERS

FACTUM OF THE INTERVENER THE DOIG RIVER FIRST NATION

Counsel for the Doig River First Nation:

Rath & Company
Barristers & Solicitors
Box 44, Site 8, RR 1
Priddis, Alberta T0L 1W0
Counsel: Jeffrey Rath/Allisun Rana

Tel: (403) 931-4047
Fax: (403) 931-4048

Ottawa Agent:

Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3
Attention: Brian A. Crane, Q.C.

Tel: (613) 233-1781
Fax: (613) 563-9869

Counsel for the Appellants
Norm Ringstad:

Fuller, Pearlman, McNeil
Barristers
1216 Broad St., Suite 103
Victoria, BC V8W 2A5
Counsel: Paul Pearlman, Q.C.

Tel: (250) 388-4550
Fax: (250) 388-7133

Ministry of the Attorney General
Legal Services Branch
P.O. Box 9289, Stn. Prov. Gov't
506 - 1175 Douglas St.
Victoria, BC V8W 9J7
Counsel: Kathryn Kickbush

Tel: (250) 387–0310
Fax: (250) 387-0343

Counsel for the Respondents
The Taku River Tlingit First Nation and
Melvin Jack:

Pape & Salter
Barristers and Solicitors
#460 - 220 Cambie St.
Vancouver, BC V6B 4M6
Counsel: Arthur C. Pape

Tel: (604) 681-3002
Fax: (604) 681-3050

Counsel for the Respondent
Redfern Resources Ltd.:

Blake, Cassels & Graydon, LLP
Barristers and Solicitors
Suite 2600, Three Bentall Centre
595 Burrard St., P.O. Box 49314
Vancouver, BC V7X 1L3
Counsel: Randal J. Kaardal

Tel: (604) 631-3300
Fax: (604) 631-3309

Ottawa Agent:

Burke Robertson
Barristers and Solicitors
70 Gloucester St.
Ottawa, Ontario K2P 0A2
Attention: Robert Houston, Q.C.

Tel: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agent:

Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3
Attention: Henry S. Brown

Tel: (613) 786-0139
Fax: (613) 563-9869

Ottawa Agent:

Blake, Cassels & Graydon LLP
Barristers and Solicitors
World ExchangeTower
20th Floor, 45 O'Connor St.
Ottawa, Ontario K1P 1A4
Attention: Gordon Cameron

Tel: (613) 788-2200
Fax: (613) 788-2247

Counsel for the Interveners:

Attorney General of Canada
Department of Justice Canada
900 - 840 Howe St.
Vancouver, BC V6Z 2S9
Counsel: Craig Cameron

Tel: (604) 666-8090
Fax: (604) 666-2710

Attorney General of Quebec

Union of British Columbia Indian Chiefs
Cook Roberts
7th Floor - 1175 Douglas St.
Victoria, BC V8W 2E1
Counsel: Robert J.M. Janes

Tel: (250) 385-1411
Fax: (250) 413-3300

First Nations Summit
Braker and Company

P.O. Box 1160, 5233 Hector Road
Port Alberni, BC V9Y 7M1
Counsel: Hugh Braker, Q.C.

Tel: (250) 723-1993
Fax: (250) 723-1994

Ottawa Agent:

Department of Justice Canada
284 Wellington St.
Ottawa, Ontario
K1A 9H8
Attention: Graham Garton, Q.C.

Tel: (613) 957-4842
Fax: (613) 954-1920

Noel & Associates s.e.n.c.
111, rue Champlain
Hull, Quebec J8X 3R1
Counsel: Me Sybie E. Roussel

Tel: (819) 771-7393
Fax: (819) 771-5397

Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3
Attention: Brian A. Crane, Q.C.

Tel: (613) 786-0212
Fax: (613) 563-9869

Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3
Attention: Brian A. Crane

Tel: (613) 786-0212
Fax: (613) 563-9869

Solicitor for the Minister of Justice and the Attorney General of Alberta
1660, 639 - 5th Avenue S.W.
Calgary, Alberta T2P 0M9
Counsel: Beverly Bauer, Q.C.

Tel: (403) 297-3781
Fax: (403) 297-6381

Business Council of British Columbia
British Columbia & Yukon Chamber of Mines
British Columbia Chamber of Commerce
British Columbia Wildlife Federation
Council of Forest Industries
Fasken Martineau DuMoulin
2100 - 1075 Georgia St. West
Vancouver, BC V6E 3G2
Counsel: Charles F. Willms

Tel: (604) 631-3131
Fax: (604) 631-3232

Lang Mitchener
300 - 50 O'Connor St.
Ottawa, Ontario K1P 6L2
Attention: Jeffrey W. Beedell

Tel: (613) 232-7171
Fax: (613) 231-3191

Mining Association of British Columbia
Aggregate Producers Association of British Columbia
Fasken Martineau DuMoulin
2100 - 1075 Georgia St. West
Vancouver, BC V6E 3G2
Counsel: Charles F. Willms

Tel: (604) 631-3131
Fax: (604) 631-3232

Lang Mitchener
300 - 50 O'Connor St.
Ottawa, Ontario K1P 6L2
Attention: Jeffrey W. Beedell

Tel: (613) 232-7171
Fax: (613) 231-3191

Attorney General of Alberta

Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3

Tel: (613) 233-1781
Fax: (613) 563-9869

TABLE OF CONTENTS

PART I - STATEMENT OF FACTS 1

PART II - ISSUES 2

PART III - ARGUMENT 3

I. Introduction 3

II. The Fiduciary Duty of the Crown 3
A. The Indivisible Crown 3
B. The Indivisible Duty 5
(i) The Source of the Crown's Fiduciary Duty 5
(ii) The Scope of the Crown's Fiduciary Duty 9
C. *Sparrow* is not the Source, but the Manifestation of the Duty 11

III. The Substantive Duty to Consult 12
A. The Crown's Fiduciary Duty Requires Protection of Asserted Rights 12
B. The Unique Nature of the Treaty Relationship 14
(i) Treaties as Express and Solemn Promises 17
(ii) Treaties as Covenants of an Ongoing Relationship 18
(iii) The Economic Basis of Treaty 8 19

IV. The Duty to Consult and the "Lands Taken Up" Provisions of the Treaties 20
A. Preliminary Issues: Procedural Concerns 20
B. Response to Alberta's Proposed Argument 21
(i) The Crown's Obligations pre-1982 22
(ii) Visible, Incompatible Use Test 23
(iii) The Effect of the *Constitution Act*, *1982* 25
(iv) The Alberta Provincial Court Decision in *Cardinal* 27
(v) Summary 28

V. Conclusion 29

PART IV - COSTS 30

PART V - ORDER SOUGHT 30

PART VI - TABLE OF AUTHORITIES 31

PART VII - STATUTES 33

PART I - STATEMENT OF FACTS

1. The Doig River First Nation ("Doig") adopts the facts set out in the factum of the Respondents, the Taku River Tlingit First Nation and Melvin Jack et al., and also relies on the following relevant facts.

2. Doig is a Treaty 8 First Nation whose reserve lands are located in northeastern British Columbia. Its members are "aboriginal peoples of Canada" within the meaning of s. 35(2) of the *Constitution Act, 1982* and constitute an Indian Band as defined by the *Indian Act*, R.S.C. 1985, c. I-5, as amended.

3. The members of Doig are direct descendants of the Beaver and Dunne'Zsa people, who for many centuries had been living in northeastern British Columbia subsisting through trapping and hunting. They also gathered and otherwise depended on the land's food and natural resources.

> *Apsassin et al.* v. *Canada*, [1988] 1 C.N.L.R. 73 at pp. 77, 87-89 (F.C.T.D.) [hereinafter *Apsassin*].

4. On June 21, 1899, the Crown and First Nations first entered into Treaty 8 in Northern Alberta. In May 1900, Doig's ancestors adhered to the Treaty at Fort St. John as part of the Fort St. John Beaver Band.

> *R.* v. *Badger*, [1996] 1 S.C.R. 771 at pp. 792-793, paras. 39-40 [hereinafter *Badger*].
> *Apsassin, supra* at pp. 101-102.

5. In 1916 the Fort St. John Beaver Band was allotted a reserve near Fort St. John, B.C., which was

subsequently surrendered and replaced by new reserves further north. In 1977, the Fort St. John Indian Band split into the Doig River and Blueberry River Bands. Through this lineage, Doig is a Treaty 8 First Nation that enjoys all the rights and promises contained in the Treaty.

> *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at pp.367-368, paras. 25-29.

6. The written and oral promises contained in Treaty 8 guarantee, among other things, the right to hunt, trap and fish and to use the land to pursue a traditional lifestyle. The Treaty guarantees that Treaty 8 First Nations and their members "shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered" and the Treaty Commissioners assured the First Nations that the "same means of earning a livelihood would continue after the treaty as existed before it", thus enshrining their Aboriginal rights as a term of the Treaty in 1899.

> *Badger, supra* at pp. 792-793, paras. 39-40.
> See: *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 at pp. 54-57, paras. 205-206 (B.C.C.A.) [hereinafter *Halfway*], for a full copy of Treaty 8 and the Beaver adhesion.

7. Doig was granted intervener status in this appeal on May 28, 2003 by Order of Mr. Justice Bastarache.

PART II - ISSUES

8. Doig's intervention in this appeal is directed to the following issue:

> Does the Crown in Right of British Columbia owe a constitutional and fiduciary duty to consult with First Nations in order to substantially address their concerns, where First Nations have claimed, but not yet proven, Aboriginal rights or title?

Doig submits that the Crown in Right of British Columbia owes fiduciary and constitutional obligations to consult with First Nations wherever there is the *possibility* that Crown action or decision-making *may* infringe Aboriginal interests, whether such interests take the form of Aboriginal rights, title or Treaty rights. This duty is engaged prior to the First Nation's rights being judicially determined.

PART III - ARGUMENT

I. Introduction

9. The Appellants take the position that the obligation that the provincial Crown owes to First Nations in the circumstances of this case is not fiduciary or constitutional, but only amounts to a "duty of fair dealing." This is based on the false premise that the Crown's fiduciary duty or trust obligations can be pigeon-holed into one of two "classes": either one that is general and protective of First Nations' interests, or one that arises by virtue of section 35(1) of the *Constitution Act*, *1982*.

    Appellants' Factum, para. 2.
    Constitution Act, *1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, section 35(1) [hereinafter s. 35(1)].

10. The Appellants also claim that the latter of these two "classes" of fiduciary duty is the only one that binds the provincial Crown, and that even then, the duty only arises <u>after</u> the section 35(1) rights at issue have been judicially determined. According to the Appellants, when such rights are asserted, but their existence has not yet been "proven", the provincial Crown's fiduciary duty is not engaged.

    Appellants' Factum, para. 80.

11. This formulation of the Crown's fiduciary duty has no support in law. The Appellants have failed to cite a single authority that has drawn a distinction between a protective duty and one that arises by virtue of section 35(1). The two "classes" of duties are, in fact, one and the same. The Appellants are advocating a severely diluted version of the Crown's fiduciary and constitutional obligations in an attempt to justify their failure to fulfill the duties owed to the Taku River Tlingit ("Taku") in the circumstances of this case.

II. The Fiduciary Duty of the Crown

A. The Indivisible Crown

12. The Appellants attempt to recast the nature of the fiduciary relationship between the Crown and First Nations by setting out the case for "the divisible Crown" and claiming that the provincial Crown "has no constitutional duty to protect Indian interests by interposing itself between First Nations and third parties."

Appellants' Factum, paras. 31 - 35.

13. The Appellants rely on *R.* v. *Secretary of State for Foreign and Commonwealth Affairs* for the principle that since at least 1926 "the Crown has been separate and divisible for each self-governing dominion or province or territory." This division of powers, however, does not mean that the Crown's fiduciary obligations can be so divided. On the contrary, Lord Justice May concluded that the provincial Crown owes a duty to First Nations despite the fact that the Crown is divisible for other purposes:

> But, in my opinion, on both the general and particular considerations to which I have referred, I do not think that this in any way means that any treaty or other obligations into which the Crown may have entered with its Indian peoples of Canada still enure against the Crown in right of the United Kingdom. Quite clearly, to the extent that these still continue, and I think that it is clear that the Canadian Courts have held that they do, <u>they are owed by the Crown in right of the Dominion or the Crown in right of the particular province</u>.

R. v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*, [1982] 2 All E.R. 118 at 142 (C.A.). [Emphasis added]

14. Canadian courts have been unequivocal in recognizing the indivisibility of the Crown in terms of its fiduciary relationship with First Nations. In *Gitanyow First Nation* v. *Canada*, the British Columbia Supreme Court rejected the divisibility argument now advanced by the Province of British Columbia, stating:

> Although the Province agrees it may not act in bad faith in negotiating with Aboriginal peoples, the implication of its position is that the duty to act in good faith aspect of the fiduciary relationship subsisting in the Crown prior to confederation passed to the Queen in Right of Canada with the constitutional assigning of responsibilities for Indians and lands reserved for Indians to the federal government in the *British North America Act* of 1867. I am not persuaded either upon principle or upon the authorities.
>
> In my view, this position is based upon an unfortunate tendency to speak of "two crowns" in Canada. There is only one Crown. The Crown "is not and never has been divisible" see Southin J.A., in dissent, in *B.C. (A.G.)* v. *Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 [[1991] 4 C.N.L.R. 4 at 36] (C.A.), writing upon a point with which the majority did not disagree.
>
> In 1867, the powers, duties and responsibilities of the Crown pre-

> Confederation were enumerated and assigned to either the Crown in Right of Canada and or the Crown in Right of the Provinces. But ... the fiduciary obligation of the Crown which characterized its relationship with Aboriginal peoples continued after 1867 as before. As a result, in its dealings with Native peoples within its jurisdictional powers, the Crown in Right of British Columbia must act in light of that duty even as its predecessor, the Crown of colonial times, should have done.

Gitanyow First Nation v. *Canada*, [1999] 3 C.N.L.R. 89, at p. 100, paras. 45-47 (B.C.S.C.). [Emphasis added]

15. The federal Crown's assumption of responsibility for the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit," pursuant to Article 13 of the *British Columbia Terms of Union*, does not eliminate the fiduciary relationship between the provincial Crown and First Nations. Both Canada and British Columbia owe fiduciary obligations to First Nations insofar as each emanation of the Crown, acting within its sphere, has the ability to affect First Nations' interests. This is consistent with the fact that the fiduciary relationship long predates Confederation. The structure of Canadian federalism was of little consequence to First Nations, as from their perspective, they were dealing with the Crown as a single entity.

Appellants' Factum, paras. 34 and 35.
Halfway, *supra*.

B. The Indivisible Duty

16. The Appellants argue that the Crown's fiduciary duty can be categorized as either a s. 35(1) duty or a "protective duty" arising from s. 18(1) of the *Indian Act*. Given that the Crown is indivisible in terms of its fiduciary relationship with First Nations, it is Doig's position that any distinction that the Appellants have attempted to draw between different "classes" of fiduciary obligations would have no bearing on the outcome of this appeal. However, Doig will address this argument, in the event that this Honourable Court deems it relevant.

17. Contrary to the Appellants' assertion, no distinction can be made between the fiduciary duty that arises in the context of s. 35(1) and the "protective duty" that the Appellants claim arises from s. 18(1) of the *Indian Act* and lies solely with the federal Crown. Indeed, this Honourable Court has given effect to this "protective duty" in delineating the *Sparrow* test for justification of s. 35(1) infringements.

(i) *The Source of the Crown's Fiduciary Duty*

18. The Appellants have attempted to exempt the provincial Crown from the fiduciary duty articulated in *Guerin* v. *The Queen* [hereinafter *Guerin*] by emphasizing the role of s. 18(1) of the *Indian Act* in that particular case. According to the Appellants, given that s. 18(1) gave the federal Crown the statutory discretion to act on behalf of First Nations, only the federal Crown's obligation was transformed into a fiduciary duty. Further, the Appellants argue that the Crown's fiduciary duty should be limited to the context of reserve land surrenders, such as in *Guerin*. According to the Appellants, the "assumption of discretionary control by the Crown which triggers this fiduciary obligation occurs only where the Crown has taken upon itself the obligation to exercise discretionary powers in the best interests of a First Nation."

Appellants' Factum, paras. 37-40.
Guerin v. *The Queen*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*].

19. A review of the historical source of the Crown's fiduciary duty shows that this narrow interpretation of *Guerin* is wrong at law. Aboriginal title is at the core of the Crown's fiduciary relationship with First Nations. According to the *Guerin* decision, the Crown's fiduciary duty is based on the combined effect of the "nature of Indian title and the framework of the statutory scheme established for disposing of Indian land."

Guerin, *supra* at p. 376.

20. Therefore, any consideration of the source of the Crown's fiduciary duty requires a consideration of the source of Indian title. Aboriginal or "Indian title" and its historic basis were considered by this Honourable Court in *Delgamuukw* v. *British Columbia* where Lamer C.J. concluded:

> It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation*, *1763*: see *St. Catherines Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples.

Delgamuukw v. *British Columbia*, [1997] 3 S.C.R. 1010 at p. 1082, para. 114. [Emphasis added]

21. As an expression of the recognition of the "prior occupation of Canada by aboriginal peoples" and the "protective" obligations of the Crown, the preamble to *The Royal Proclamation's* provisions concerning First Nations states as follows:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds ...

The Royal Proclamation, *1763* R.S.C. 1985, App. II, No. 1 at 4-5 [hereinafter *Royal Proclamation*].

22. Even the "statutory scheme" that, according to *Guerin*, contributes to the fiduciary relationship has its origins in the historic Crown-First Nations relationship and the promises of protection offered by the Crown. As explained by Hutchins *et al.*:

> In our struggle to discover and understand first principles, it is always wise to start at the beginning. In the case of the fiduciary relationship between Aboriginal peoples and the Crown, the beginning was the first meeting of Europeans and Aboriginal peoples...Wherever and whenever the first meetings took place, Aboriginal peoples were the hosts in their homelands to the European visitors...
>
> ...
>
> The visitors brought with them various goods and services — trade goods, military support, agricultural implements — and the ubiquitous promises: promises of protection, promises of civilization, promises of riches, promises of security. It was these promises and their acceptance by the Aboriginal peoples that laid the foundation for the fiduciary relationship between the parties and the resulting fiduciary obligations of the Crown.
>
> From ocean to ocean to ocean, on the strength of these promises, Aboriginal peoples granted access to, or agreed to share, their lands and resources, or agreed to be faithful allies, or to put themselves and their lands under the protection of the European sovereign. <u>Through this process, the Crown took on the privilege and burden of being the sole beneficiary of any surrender of Aboriginal rights, titles or sovereignty</u>.

Peter W. Hutchins, David Schulze and Carol Hilling, "When do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask. L. Rev. 97 at 100. [Emphasis added]

23. The fiduciary relationship also has strong foundations in equity. Indeed, this equitable lineage pre-dates Canada's own existence and, as an example, can be seen in the joint address to the Senate and House of Commons accompanying the admission of Rupert's Land and the North Western Territory to the Dominion of Canada:

> ...upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

Rupert's Land and North Western Territory Order, R.S.C. 1985, App. II, No. 9 at 8 [hereinafter *Rupert's Land Order*]. [Emphasis added]

24. As such, the equitable obligations of the British Crown, which were recognized in the *Royal Proclamation*, were passed on to the Crown in Right of Canada.

25. The *Natural Resources Transfer Agreement* [hereinafter *NRTA*], wherein the federal Crown transferred jurisdiction over lands and resources to the provincial Crowns, ensures that the equitable obligations passed along with these transfers. For example, in the Alberta, Saskatchewan and Manitoba context, the Province's jurisdiction over lands and resources is restricted by the caveat set out in section 2 of the *NRTA*, which states that the transfer of Crown lands from the federal Crown to the provincial Crown is "subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same" and that the Province is correspondingly bound to respect such interests. The Treaty rights of First Nations and the fiduciary and treaty obligations of the Crown fall squarely within these provisos.

Constitution Act, 1930 (Natural Resources Transfer Agreement), 20 & 21 Geo. 5, c. 3 (U.K..) with Schedules.

26. Courts have reached this very conclusion. In the Alberta Court of Appeal ruling in *Badger*, Kerans J.A. stated:

> [The *NRTA*] is sufficiently clear that ... the new provincial powers and properties were not offered free of treaty obligations. I emphasize that the Agreement was not primarily about Indians. It was about Crown Lands, and the long-sought transfer of them from Canada to the provinces. But it was also about the transfer of obligation.

Citing section 2 of the *NRTA*, Kerans J.A. went on to observe:

> ... [T]his term would encumber all transferred Crown lands with whatever obligation was owed the Cree under the treaty.

R. v. *Badger*, [1993] 3 C.N.L.R. 143 at p. 150 (Alta. C.A.). [Emphasis added]

27. As is evidenced by the *Royal Proclamation*, the *Rupert's Land Order* and the *NRTA*, the federal Crown's title to Dominion lands and its ability to transfer jurisdiction to the various provincial Crowns has always been subject to the Crown's overarching equitable obligations owing to First Nations. While the law now employs the concepts and language of "fiduciary" to characterize the Crown-First Nations relationship, these concepts find their origins in the pre-surrender, pre-Confederation foundations of equity and must be seen in that light. This is what is signified, at least in part, by the *sui generis* nature of Aboriginal rights and title: their equitable underpinnings render them unique. The result is that, in acting in its fiduciary capacity, the Crown has a primary and overriding duty to act "equitably" – that is, in accordance with the dictates of equity.

28. The Appellants' disconnection of the s. 35(1) fiduciary duty from the "protective duty" completely ignores the *Guerin* principle that the Crown's fiduciary duty is <u>also</u> founded on the nature of Indian title, which is the "legal right derived from the Indians' historic occupation and possession of their tribal lands." Since the Crown's fiduciary duty also flows from the historic prior occupation of Canada by First Nations, it cannot be strictly limited to the particular circumstances of s. 18(1) of the *Indian Act*.

Guerin, *supra* at p. 376.

29. The fiduciary duty of the Crown pre-exists the establishment of the Dominion of Canada and its provinces as well as the colonial administration of British Columbia. It flows directly from the Sovereign in Right of the United Kingdom, who has always recognized that unsurrendered Aboriginal titled lands are only administered by the Crown in trust for Canada's First Nations.

(ii) *<u>The Scope of the Crown's Fiduciary Duty</u>*

30. The Appellants assert that the Crown's fiduciary duty arises only in situations where the Crown is required to act in the best interests of First Nations, as it is pursuant to s. 18(1) of the *Indian Act*. This assertion is based on the fact that *Guerin* arose out of a dispute over a reserve land surrender that was conducted pursuant to s. 18(1) of the *Indian Act*. In Doig's submission, *Guerin* stands for the general principle that a breach of the Crown's fiduciary duty is treated at law as if it were a breach of an express trust. Contrary to the Appellants' suggestion, nothing turns on s. 18(1). It is simply an indicator of the Crown's *sui generis* fiduciary duty – <u>not</u> the entire basis of that duty.

Indeed, Justice Dickson's reasons in *Guerin* indicate that s. 18(1) of the *Indian Act* has its genesis in the *Royal Proclamation*:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> *Guerin*, *supra* at pp. 383-384.

31. Subsequent cases have recognized the Crown's historic responsibility and have not limited the recognition of the fiduciary duty to instances of reserve land surrenders. In *Osoyoos Indian Band* v. *Oliver (Town)* [hereinafter *Osoyoos*], the majority judgment of this Honourable Court stated specifically that "the fiduciary duty of the Crown is not restricted to instances of surrender." Indeed, *Osoyoos* indicates that the fiduciary obligation arises <u>whenever</u> the Crown's exercise of its discretion may impair the interests of First Nations:

> Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian land by the band. This is consistent with the provisions of s. 35 which gives the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.
>
> This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its <u>fiduciary duty to Indians whose lands are affected by the expropriation</u>. In the first stage, the Crown acts in the public interest in determining than an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, <u>the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable</u>.
>
> *Osoyoos Indian Band* v. *Oliver (Town)*, [2001] 3 S.C.R. 746 at pp. 772-773, paras. 52-53. [Emphasis added]

32. The Appellants also raise the decision of this Honourable Court in *Wewaykum Indian Band* v. *Canada* [hereinafter *Wewaykum*]. However, the *Wewaykum* case is clearly distinguishable from

the case at bar because the reserve lands claimed in that case were not claimed pursuant to a Treaty or Aboriginal right, nor were they claimed to be subject to an unextinguished Aboriginal title. As such, no s. 35(1) issue arose in the context of that litigation. Despite this, the Court did recognize that the circumstances gave rise to a limited fiduciary duty on the part of the Crown.

Wewaykum Indian Band v. *Canada* (2002), 220 D.L.R. (4th) 1 at p. 42, para. 97 (S.C.C.).

33. Moreover, in *Wewaykum*, this Honourable Court cautioned against such a narrow reading of *Guerin*, rejected the Crown's overly restricted view of its fiduciary obligations, and confirmed that *Osoyoos* stood for the principle that the fiduciary duty is not limited to cases of reserve land surrender.

Wewaykum, *supra* at pp. 42, 44, para. 98, 104.

34. Thus, the Crown's fiduciary duty is invoked whenever the exercise of the Crown's discretion could impact the constitutionally protected interests of First Nations. Although in *Guerin* the interest at issue was reserve land, there is no principled reason to read *Guerin* narrowly and therefore limit the application of the Crown's fiduciary duty to reserve land surrenders.

C. *Sparrow* is not the Source, but the Manifestation of the Duty

35. The statutory scheme that governs land surrenders may well invoke the duties of the federal Crown, but as indicated above, the nature of Indian title is a principle that extends beyond the First Nations' relationship with the federal Crown. This principle can be traced forward to the articulation of the fiduciary duty in the context of the *Sparrow* test, which the Appellants concede applies to both the federal and provincial Crowns. Although there was no land surrender at issue in *R.* v. *Sparrow*, and accordingly, "the statutory scheme established for disposing of Indian land" was not implicated, Chief Justice Dickson stated as follows:

> In our opinion, *Guerin*, together with *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for section 35(1): That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.
> ...
>
> In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such

> scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* v. *The Queen*, *supra*.
>
> *R.* v. *Sparrow,* [1990] 1 S.C.R. 1075 at pp. 1108-1109 [hereinafter *Sparrow*].

36. Clearly, it is the Crown's fiduciary duty that requires the justification of infringements of section 35(1) rights, which includes the obligation to consult. Section 35(1) itself is not the source of the obligation, it simply embodies the broader fiduciary duty owing to First Nations by the federal and provincial Crowns that results from the historic relationship between the Crown and First Nations. As explained by Lambert J.A. in *Haida Nation* v. *British Columbia (Minister of Forests)*:

> The duty to consult and seek an accommodation does not arise simply from a *Sparrow* analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection.
>
> *Haida Nation* v. *British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121 at p. 139, para. 55.

37. Since the provincial Crown is also obligated to justify infringements of section 35(1) rights in accordance with the *Sparrow* test (see, for example, *R.* v. *Sundown*, *infra*, para. 57, *Badger*, *supra*, *Halfway, supra*, *Nunavik Inuit* v. *Canada (Minister of Canadian Heritage*), [1998] 4 C.N.L.R. 68 (F.C.T.D.)), there can be no question that the provincial Crown also owes First Nations the fiduciary obligations that form the basis of the test. This logic was effectively stated by Professor Brian Slattery in his article, "Understanding Aboriginal Rights":

> The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.
>
> Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 C.B.R. 727 at 755.

III. <u>The Substantive Duty to Consult</u>

A. <u>The Crown's Fiduciary Duty Requires Protection of Asserted Rights</u>

38. The Appellants characterize the justificatory standard set out in *Sparrow* as one that seeks to reconcile Aboriginal rights with Crown sovereignty. They emphasize that this does not "involve the

Crown taking upon itself the responsibility to act solely on behalf, or for the benefit of, aboriginal peoples."

> Appellants' Factum, para. 54.

39. Reconciliation provides a way for the Crown to fulfill its fiduciary duty owing to First Nations. However, this "reconciliation" does not mean that public interests take priority over First Nations' interests. The *Sparrow* test is employed to ensure that First Nations' interests are not overrun by the interests of the broader community, who form the proverbial "tyrannical majority", all too often inimical to First Nations' interests.

40. The Appellants also argue that "until the existence and scope of an asserted aboriginal right, or claim of aboriginal title, has been determined, the Crown ought not to be held to the standard of a fiduciary when making resource allocation decisions which may affect First Nations interests"(Appellants' Factum, para. 78). This argument defies logic and is contrary to the Crown's obligation or promise of protection that gave rise to the fiduciary relationship. At the Court of Appeal level of these proceedings, Madam Justice Rowles noted that any requirement that the rights-claimant should have to prove the existence of the right prior to receiving any protection "would have the effect of robbing section 35(1) of much of its constitutional significance." Rowles J.A. also considered the negative effect such an argument would have on the resolution of First Nations' claims:

> Moreover, decisions of the Supreme Court of Canada have referred to the importance of s. 35(1) of the Constitution Act, 1982, in providing a foundation for the negotiation and settlement of Aboriginal land claims. To say, as the Crown does here, that establishment of the Aboriginal rights or title in court proceedings is required before meaningful consultation is required, would effectively end any prospect of meaningful negotiation or settlement of Aboriginal land claims.

> B.C.C.A. Reasons, January 31, 2002, Rowles J.A. at para. 174, Appellants' Record Vol. 1.

41. This same reasoning was adopted by Justice Lambert in *Haida*. Although this decision is presently under appeal, the logic is clear:

> If the Crown can ignore or override Aboriginal title or Aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of Aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claimed Aboriginal title or rights, even on an interim basis.

Haida, *supra* at p. 124, para. 10.

42. If the Appellants' argument is correct, whenever the Crown disputes the existence of the rights at issue the only remedy available for the First Nation would be compensation for damages after the rights have been impacted. In cases such as *Mikisew Cree First Nation* v. *Canada*, where the Crown denied the existence of Mikisew's rights to hunt and trap in Wood Buffalo National Park in an effort to excuse itself from its fiduciary duty to consult prior to building a road through Mikisew's traditional territory, the subsequent finding by the trial judge that the rights did exist would be meaningless as the harm would have already been done.

Mikisew Cree First Nation v. *Canada (Minister of Canadian Heritage*), [2002] 1 C.N.L.R. 169 (F.C.T.D.).
See also: *Halfway*, *supra*.

43. There are very few circumstances in which a First Nation could refer to a prior determination of its rights to hold the Crown to its fiduciary duty. The issue most frequently arises in the context of a resource development project where timelines are in place and project proponents are pushing hard to proceed with development. At this point, the First Nation's land use is already being threatened by the proposed project and there is insufficient time to complete a lengthy trial process to obtain a determination of rights. Even if a First Nation elects to undergo this process, by the time there is a determination of rights, it will be too late – the rights will have already been infringed. In many cases, the impact of the development on the environment can be so damaging that by the time the Aboriginal or Treaty right has been "determined", the effective exercise of the right is impossible.

44. Furthermore, without an assumption of the right by the Crown at the outset, First Nations are forced into a position of either obtaining an injunction or seeking a stay of the development, shifting the onus of justification away from the Crown and onto the First Nation.

B. The Unique Nature of the Treaty Relationship

45. The Treaty relationship must be considered in the context of this appeal because, in Doig's submission, the Appellants will undoubtedly attempt to rely on any ruling that is favourable to their position to limit their fiduciary obligations owing to Treaty First Nations. Similarly, in the event that

the Appellants are unsuccessful on appeal, they will attempt to exclude Treaty First Nations from the application of the ruling. Accordingly, any decision in this appeal will impact the rights of Treaty First Nations, whether or not such impact was intended.

46. Upon examination of the manner in which this case was argued at the Court of Appeal, it is clear that the Appellants intend to extend any success they may have in this appeal to Treaty First Nations. While it is true that Taku did not assert a Treaty right, the Appellants referred to Aboriginal and Treaty rights interchangeably throughout and even relied on jurisprudence from the Treaty context to support their argument. The Appellants' position on the law is summed up by the Court of Appeal at paragraph 141:

> In the appellants' submission, the following decisions of the Supreme Court of Canada support their argument that any constitutional or fiduciary obligation to consult with First Nations only arises after there has been a determination that the First Nation has existing Aboriginal or treaty rights under s.35 of the *Constitution Act*, *1982*: *R.* v. *Sparrow*, ... *R.* v. *Adams*, ... *Delgamuukw* v. *British Columbia*, ... and *R.* v. *Marshall.*
>
> B.C.C.A. Reasons, *supra* at para. 141. [Emphasis added]

47. In citing the decision in *R.* v. *Marshall*, the Appellants relied on paragraphs 111-113 of the Chief Justice's reasons. Of particular import, is paragraph 113 which states:

> Instead of positing an undefined right and then requiring justification, a claim for breach of a treaty right should begin by defining the core of that right and seeking its modern counterpart. Then the question of whether the law at issue derogates from that right can be explored, and any justification for such derogation examined, in a meaningful way.
>
> B.C.C.A. Reasons, *supra* at para. 177.

48. The Appellants have taken the position that where the asserted right is a Treaty right, the existence of that right is not a settled issue. Indeed, Crown opposition to First Nations' assertions of Treaty rights and requests for consultation has consistently been premised on the argument that the Treaty right asserted does not exist. A recent example is found in *Mikisew*, *supra*, where the Crown denied that the First Nation had Treaty rights to hunt and trap in Wood Buffalo National Park, and as such, were not entitled to be consulted in accordance with the Crown's fiduciary duty.

49. The Appellants identified this very concern in their carefully worded Response to Doig's

intervention application. In "conceding" that the Provincial Crown owes a fiduciary obligation to justify infringements of Treaty rights, the Appellants stated:

> The Provincial Crown does not dispute that it owes a fiduciary obligation to justify the infringement of <u>existing</u> aboriginal and treaty rights."

The issue then becomes whether or not the Treaty right asserted is "existing".

> Appellant's Response, para. 9. [Emphasis added]

50. Tellingly, the above argument was put forward by the Appellants in <u>opposition</u> to Doig's intervention. The Appellants argued that Doig not be given leave to intervene because there was no issue "regarding the obligation of the Province to consult in respect of constitutionally protected Treaty rights." There can be no doubt that the Appellants are of the view that any ruling in favour of Taku should be limited to cases concerning Aboriginal rights and title. Accordingly, Doig submits that it is necessary for this Honourable Court to consider the impact this appeal will have on Treaty First Nations.

> Appellant's Response, para. 9.

51. Both of the courts below emphasized that the federal and provincial governments had entered into Treaty negotiations with Taku. This, they held, put the Province on clear notice of the existence of Taku's Aboriginal rights, which in turn required that the Province be alert to possible infringements of those rights resulting from Crown actions. In Doig's submission, if the entering into Treaty negotiations with the Crown provides sufficient notice, it follows that the <u>existence</u> of a Treaty constitutes incontrovertible notice to the Crown of the existence of First Nations' Treaty rights that the Crown is required to recognize and affirm.

> B.C.C.A. Reasons, *supra* at paras. 191-193.
> B.C.S.C. Reasons, June 28, 2000, Kirkpatrick J., at para. 130, Appellants' Record, Vol. 1.
> Section 35(1), *supra*.

52. In Doig's submission, the existence of a Treaty between First Nations and the Crown serves to <u>strengthen</u> the fiduciary relationship. This is supported by the British Columbia Court of Appeal in the *Halfway* case, where Finch J.A. discussed the interplay of Aboriginal rights, fiduciary duty and Treaty rights:

> The fact that a treaty underlies the Aboriginal right...does not, to my mind, render inapplicable the s. 35(1) analysis engaged by the court in *Sparrow*. Section 35(1) gives constitutional status to both Aboriginal and treaty rights.

> As indicated above, treaties with Aboriginal peoples have always engaged the honour and integrity of the Crown. The fiduciary duties of the Crown, are if anything, more obvious where it has reduced its solemn promises to writing.
>
> *Halfway*, *supra* at p. 38, para. 127.

53. In their article, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective", McMurtry and Pratt also examine the significance of Treaties in the context of the Crown's fiduciary duty. Recognizing that the *Royal Proclamation* represents the fact that First Nations were "induced by the promise of protection" to "alter their legal position" and "keep ... the peace", the authors conclude that "the promise cannot now be ignored to the Indians' detriment whenever their land interests are interfered with by the Crown." They continue:

> Likewise, the Indian treaties, particularly the treaties of the latter part of the nineteenth century and early twentieth century, which expressly deal with land surrenders directly to the Crown, are "agreements" concluded within the framework of the regime established in 1763. One recalls Mr. Justice Dickson's description of the creation of the fiduciary relationships as including agreements and unilateral undertakings. Like the Musqueam surrender in the 1950s, the treaties were entered into at the instigation of the representatives of the Crown, based upon oral negotiations and assurances similar to those which Mr. Justice Dickson states "<u>form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured</u>."
>
> William McMurtry & Allan Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" [1986] 3 CNLR 19 at pp. 31-32. [Emphasis added]

54. Doig relies on three arguments in support of its position that the assertion of a Treaty right is sufficient to engage the Crown's fiduciary duty to consult. Doig's position is based on the unique nature of the Treaty relationship as an additional source founding the Crown's fiduciary duty. In Doig's submission, upon assertion of their rights, Treaty 8 First Nations have <u>at least</u> an equal claim to consultation by the Province of British Columbia as other s. 35(1) rights claimants given that:

    (1) Treaty 8 represents an express and solemn promise by the Crown;

    (2) Treaty 8 is a covenant of an ongoing relationship between the Crown and First Nations; and

    (3) this ongoing Treaty relationship between Treaty 8 First Nations and the Crown carries a strong economic component.

(i) *Treaties as Express and Solemn Promises*

55. Doig submits that the very existence of Treaty 8 and the express promises it contains puts the Province on notice of Doig's rights and triggers the duty to consult and accommodate.

56. As this Honourable Court has noted, Treaty rights originate in the official agreements entered into by the Crown and First Nations. Treaties create enforceable obligations based on the mutual consent of the parties, as expressed in the Crown's oral and written promises and often, like Treaty 8, take statutory form through their approval by Order in Council.

Badger, supra at p. 812, para. 76.

57. This Court has repeatedly and unequivocally recognized the sacred nature of the Treaties and the solemnity of the promises they contain. Strict rules of construction are applied to Crown actions that purport to extinguish or limit Treaty rights, acknowledging the fact that Treaties represent express and solemn promises that engage the honour of the Crown.

Badger, supra at pp. 793-794, para. 41.
R. v. *Sundown*, [1999] 1 S.C.R. 393 at pp. 406-407, para. 24 [hereinafter *Sundown*].

58. The same consideration led this Court to observe that "it is equally if not more important to justify *prima facie* infringements of Treaty rights" as opposed to Aboriginal rights, given that the rights specifically granted to First Nations by Treaty "form an integral part of the consideration for the surrender of their lands".

Badger, supra at pp. 814-815, para. 82.

59. Given the express nature of Treaty rights, the Crown simply cannot plead ignorance of or uncertainty as to their existence. Specifically, the difficulties attendant on proof of Aboriginal rights and title – on which the Province relies in this case to defeat the requirement of a front-end duty to consult and to argue for a duty that is triggered only once those rights have been definitively proven in court – cannot be sustained in relation to Treaty 8 rights in British Columbia.

60. *Badger* and other Treaty cases demonstrate that the terms of the Treaty, which include both the written terms and the contemporaneous oral promises made by the Crown during Treaty negotiations, provide the necessary basis for adjudicating Treaty-based claims. Proof that a First Nation is signatory to a given Treaty is proof that it enjoys the Treaty rights.

Badger, *supra* at pp. 792-794, paras. 39-41.

Mikisew, *supra* at p. 183, paras. 49-50.

(ii) *Treaties as Covenants of an Ongoing Relationship*

61. In the context of the present appeal, the ongoing relationship between Doig and the Crown enshrined in Treaty 8 imposes a reinforced or 'super-added' duty on the Province to be vigilant in protecting Doig's rights by consulting with and accommodating Doig prior to any possible infringement of its Treaty rights.

62. The nature and character of the Treaty relationship lend additional force to the fiduciary principles that support a front-end duty to consult. Treaties are covenants of an ongoing relationship between Treaty First Nations and the Crown, establishing a permanent framework for future relations and prescribing ongoing rights and obligations. Where Treaties have been signed, they are the starting point for reconciling pre-existing Aboriginal societies with the sovereignty of the Crown – such reconciliation having been identified by this Court as the purpose and promise of s. 35(1).

R. v. *Van der Peet*, [1996] 2 S.C.R. 507 at p. 539, paras. 31-32.

63. This Court has repeatedly recognized the sacred character of the Treaties and the covenant-like relationship they uphold. As the jurisprudence affirms, the honour of the Crown is always at stake when it deals with Treaty rights, and it is always assumed that the Crown intends to honour and fulfill its Treaty promises.

Badger, *supra* at pp. 793-794, 796-797, paras. 41, 47.

(iii) *The Economic Basis of Treaty 8*

64. Treaty 8 was concluded after its First Nations signatories had experienced 20 years of famine and economic hardship. Given this context, and the Crown's oral and written promises promoting Treaty 8 as a means for the First Nations to secure their economic future, the Crown-First Nations relationship created by Treaty 8 carries a strong economic component.

Badger, *supra* at pp. 792-793, 800-804, paras. 39, 55-58.
R. v. Horseman, [1990] 1 S.C.R. 901 at pp. 908-913.

65. The economic basis underlying Treaty 8 reinforces the Province's duty to consult regarding decisions that could affect the ongoing, Treaty-based economic relationship between Treaty First Nations and the Crown, particularly where those decisions could themselves either facilitate or inhibit Treaty First Nations economic well-being and self-sufficiency.

66. It is consultation that ensures that First Nations have a voice in the nature of the development of their traditional lands, their role in this development and the impact that this development will have on the exercise of their Treaty rights. Given the economic basis underlying the Treaty, the Crown must consider its impacts on First Nations' economic interests on an ongoing basis.

67. If the Crown is not held to its fiduciary duty to consult and accommodate prior to making decisions that could infringe Treaty rights, Treaty 8 will lose its meaning as an expression of solemn promises and a covenant of the ongoing relationship between the Crown and First Nations. The economic basis of the Treaty will be undermined and First Nations will be excluded from participation in the development of their lands.

IV. The Duty to Consult and the "Lands Taken Up" Provisions of the Treaties

68. In light of this Court's recent Order granting Alberta leave to intervene in this appeal, Doig is compelled to address the issue Alberta outlines in its Notice of Motion with respect to the duty to consult in the context of the "lands taken up" provisions of the Treaties. At the core of Alberta's proposed submissions is the argument that the Crown is not required to consult with First Nations when taking up lands for *bona fide* purposes where Treaties contemplate that land may be taken up for settlement or other purposes.

A. Preliminary Issues: Procedural Concerns

69. Doig has several significant procedural concerns to raise prior to addressing the merits of Alberta's proposed argument. First, Doig submits that Alberta is proposing to make an argument that requires evidence that is not before this Court. As there has been no consideration of the interpretation of any Treaties by the lower courts in addressing this case, there is a total absence of historical evidence, expert evidence and legal argument as to how the "lands taken up" provisions should be interpreted. As noted by Alberta in its Notice of Motion, the Alberta Provincial Court considered this issue in a Treaty 6 case "after hearing the expert evidence on the part of Alberta." (Notice of Motion, p. 3, para. (a)ii) There is no such evidence before this Court, nor was any evidence introduced in the British Columbia Supreme Court or the British Columbia

Court of Appeal. Doig submits that this evidentiary record must be before the Court before the argument can even be considered.

70. Mr. Justice Binnie also recognized this concern in the July 18, 2003 Order granting Alberta leave to intervene, where he stated that the "lands taken up" argument

> would require a substantial factual record with respect to specific treaties and their specific provisions, and such enlargement of the factual record is simply beyond the scope of the appeal. [Emphasis added]

71. Further, Alberta is attempting to bring its argument regarding the "lands taken up" provisions prematurely. As Alberta states in its Notice of Motion, "Alberta is involved in litigation within the Province concerning the duty to consult and when it arises." (p. 2, para. (a)ii) This litigation should be fully adjudicated in the Alberta courts prior to being considered at the Supreme Court of Canada, especially given the absence of evidence regarding the "lands taken up" provision in the present case. Further, the courts have noted that the Crown should conduct itself with care in litigation with First Nations.

> *Guerin*, *supra* at p. 353.

72. It also appears that Alberta is attempting to abuse the Court's process by short-circuiting the cases that are pending at lower levels in order to argue the interpretation of the "lands taken up" provisions in a forum that will not involve the participation of any Alberta Treaty First Nations who would otherwise have an interest in making their own arguments as to the manner in which the "lands taken up" provisions should be interpreted. In Doig's view, this raises a serious question of fairness with regard to the raising of this argument at this late date, absent parties that have a serious interest in the outcome. These interested First Nations could not have anticipated that Alberta would seek to make this argument in litigation concerning the timing of the duty to consult, rather than the interpretation of a particular provision in the Treaties.

73. Given the above, Doig respectfully submits that Alberta's "lands taken up" argument should not be addressed by this Honourable Court. The rules of procedure are designed to ensure fairness when issues are brought before the courts, and Alberta's disregard for these rules has unfairly prejudiced the interests of all Treaty First Nations.

74. As the only Treaty First Nation involved in this appeal, Doig now bears the full weight of addressing Alberta's arguments regarding the interpretation of the "lands taken up" provisions without having had the opportunity to review Alberta's factum, and without the benefit of an evidentiary record upon which to base its argument. Although this Honourable Court has clearly stated that Alberta's proposed argument cannot be advanced absent a "substantial factual record", out of an abundance of caution Doig is forced to dedicate a significant portion of its written argument in response.

B. Response to Alberta's Proposed Argument

75. In the event that this Honourable Court considers the substance of Alberta's argument concerning the "lands taken up" issue, Doig submits that the argument itself should fail on the merits. As both a matter of law and logic, Alberta's argument is a non-starter.

76. In its Notice of Motion, Alberta admits only that the duty to consult arises where the Crown contemplates regulation of Aboriginal subsistence fishing and hunting, and where Aboriginal title claims or other Aboriginal rights have been proven to exist. However, Alberta then argues that the Crown's duty to consult with First Nations does not arise where the Treaties contemplate that land may be taken up for settlement or other purposes.

77. Doig submits that Alberta's position is contrary to the jurisprudence, including the decisions of this Honourable Court in *Sparrow, supra, Badger, supra* and *Sundown, supra*. Alberta seeks to argue that s. 35(1) and the *Sparrow* and *Badger* decisions do not apply with respect to Treaty First Nations where the Crown designates its infringing actions as falling under the rubric of the "taking up of lands" provision in the numbered Treaties.

78. Doig will address Alberta's argument by canvassing the evolution of the jurisprudence concerning the "taking up of lands", and by examining *R.* v. *Cardinal*, *infra*, the May 23, 2003 decision of the Alberta Provincial Court, upon which Alberta intends to rely.

(i) The Crown's Obligations pre-1982

79. As Alberta notes in its Notice of Motion, since the signing of the numbered Treaties a significant amount of land and resources have been taken up for development without consultation with First Nations. While it was not until Aboriginal and Treaty rights gained constitutional protection in 1982 that the Crown's constitutional duty to consult arose, prior to 1982 the Crown still owed a fiduciary duty to balance the taking up of lands with the use of the land by First Nations. As explained more fully above, this conclusion is consistent with the *NRTA*, which transfered Crown lands from the federal Crown to the provincial Crown "subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same."

> *NRTA*, *supra*.

80. The British Columbia Court of Appeal in *Halfway* also considered the pre-1982 obligation. As noted by Mr. Justice Finch:

> The third observation I would like to make is that the Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in *Sundown*, [1999] S.C.J. No. 13 at paras. 42 and 43. The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless. Such a position cannot be asserted in conformity with the Crown's honour and integrity. So even before the enactment of s. 35 in 1982, a balancing of the competing rights to the parties of the Treaty was necessary.

> *Halfway*, *supra* at p. 40, para. 134. [Emphasis added]

81. In *Mikisew*, *supra*, Madam Justice Hansen specifically addressed the "lands taken up" provision in Treaty 8 when she considered Canada's claim that the land at issue had been "taken up" in 1922 for use as a National Park. Hansen J. cited *Badger*, *supra*, for the principle that "any limitations that restrict the rights of Indians under treaties must be narrowly construed" and stated that:

> Therefore, the provisions of Treaty No. 8 purporting to allow the "taking up" of lands (for various purposes) must be interpreted in a manner that honours the oral agreement. Since the "taking up" of lands by the Crown would effect an extinguishment of the treaty right in the area taken up, the "taking up" of lands may also only be effected by strict proof of a "clear and plain intention".

> *Mikisew*, *supra* at p. 184, para. 59.

82. Accordingly, even when scrutinizing pre-1982 "takings" for determining whether Treaty and Aboriginal rights are still "existing" for the purposes of s. 35(1), courts have made it clear that the Crown will be held to strict proof and to a high standard, as for any extinguishment argument. Clearly, the Crown's obligations flow not only from the entrenchment of s. 35(1), but from the pre-1982 fiduciary relationship and the principles of Treaty interpretation which have taken on an even greater significance post-1982. This shift in emphasis can be seen clearly in *Badger* and subsequent cases.

(ii) *Visible, Incompatible Use Test*

83. When determining if lands have been taken up for other purposes, such that the Treaty right in question cannot be exercised in a certain area, the courts employ a test that considers whether the land use is visibly incompatible with the exercise of the Treaty right.

84. In *Badger*, Justice Cory referred to earlier case law to support the visible, incompatible use test. He referred, for example, to *R. v. Smith*, which concerned whether there was a Treaty right to hunt for food on a game preserve located on Crown land. Cory J. endorsed as "sensible" the Court's holding that Indians did not have a right of access to hunt on the game preserve because to do so would be incompatible with the fundamental purpose of establishing the preserve. At the same time, Justice Cory also referred approvingly to cases holding that hunting for food was not incompatible with use of Crown land as a forest (*R.* v. *Strongquill*) or as a wildlife management area or fur conservation area (*R.* v. *Strongquill*, *R.* v. *Sutherland* and *R.* v. *Moosehunter*).

Badger, *supra* at pp. 804-805, para. 59.
R. v. Smith, [1935] 2 W.W.R. 433 (Sask. C.A.).
R. v. Strongquill, (1953) 8 W.W.R. 247 (Sask. C.A.).
R. v. Sutherland, [1980] 2 S.C.R. 451.
Moosehunter v. *The Queen*, [1981] 1 S.C.R. 282.

85. In *Mikisew*, *supra*, Hansen J. also applied the "visible and incompatible use" test, noting that in *Badger* this Honourable Court explained that whether land has been "taken up" was a question of fact to be decided on a case-by-case basis. She later concluded that the lands of Wood Buffalo National Park had not been "taken up" in a manner incompatible with the right to hunt or trap by Mikisew, stating that on the facts

> I am satisfied that the exercise of a right to trap and hunt is not incompatible with the use of land as a national park, particularly with respect to a park that is as large and as remote as WBNP.
>
> *Mikisew*, *supra* at pp. 185, 189, paras. 61, 75.

86. Similarly, in *Sundown*, *supra*, this Honourable Court held that the lands of Meadow Lake Provincial Park had not been taken up in a manner "wholly incompatible with the ... right to hunt", and in *Halfway* Madam Justice Huddart of the British Columbia Court of Appeal held that the province's issuance of a forestry cutting permit was not necessarily incompatible with the Treaty right to hunt. Huddart J. saw the issue as a preliminary one to be assessed during the application of the *Sparrow* justification test.

> *Sundown*, *supra* at p. 415, para. 43.
> *Halfway*, *supra* at p. 46, para. 173.

(iii) *The Effect of the Constitution Act, 1982*

87. In the rare cases where it may be found that land has been taken up in a manner visibly incompatible with the exercise of Treaty rights, s. 35(1) of the *Constitution Act*, *1982* requires the Crown's actions to undergo the scrutiny of the justification test in *Sparrow*.

88. The *Sparrow* test applies to both *prima facie* impacts on Treaty rights and to the Crown's attempts to take up land pursuant to the visible, incompatible use test because the taking up of land represents an impact on rights, given that it completely eliminates their exercise in a particular location.

89. According to Alberta's proposed argument, the *Sparrow* test only applies to the first of these two means by which the Crown can impact Treaty rights. With respect, this position is wholly inconsistent with the honour and integrity of the Crown, which required the Crown to balance the Treaty rights of First Nations with land development even prior to 1982. Further, it is unreasonable to assert that there is a consultation requirement for *prima facie* impacts on Treaty rights, but no such requirement when the exercise of the right is being wholly eliminated in a particular area by

an incompatible use.

Halfway, *supra* p. 40, para. 134.

90. The potential implications of Alberta's position are far-reaching. Given that entire provinces have arguably been "taken up" many times over, by overlapping forestry licences, diamond exploration licences, seismic exploration permits, petroleum exploration permits, mining leases, wellsites, cutlines, pipelines, road right-of-ways, parks, recreation areas, wildlife management areas, watershed management areas and the like, to find in favour of such an argument would be to effectively find that land use-related Treaty rights no longer exist in any province.

91. In addition to being rejected by the British Columbia Court of Appeal in *Halfway*, *supra*, the "lands taken up" argument was also rejected by the Provincial Court of Alberta in *R.* v. *Breaker* [hereinafter *Breaker*]. *Breaker* clearly demonstrates the 'avoidance' or 'bootstrap' logic of Alberta's argument that no duty to consult exists as a result of the "lands taken up" provisions of the Treaties. In *Breaker*, the accused was a member of a Treaty 7 First Nation who was charged with unlawfully hunting within a road corridor wildlife sanctuary. Judge Cioni of the Alberta Provincial Court determined that the accused had an established Aboriginal, Treaty and Constitutional right to hunt for food in the area within which the sanctuary corridor existed. The judge then addressed the Provincial Crown's argument that by occupying the sanctuary corridor lands, it had extinguished the accused's right to hunt on those lands:

> Being satisfied that Mr. Breaker was exercising an established Aboriginal, Treaty and Constitutional right to hunt for food in the Highwood, is there a basis, at this point, to give effect to the Crown's contention, that by occupying the Highwood Corridor (for a valid purpose of conservation) the Crown has extinguished that right and that the *Sparrow* test has been met, or negated, or collapsed.
>
> Firstly, following *Delgamuukw*, I find that the Crown, *per se*, or by *proprio vigore* (by its own force, see: *Jowitt's Dictionary of English Law*, 2nd ed.), and s.88 of the *Indian Act* cannot *extinguish* Mr. Breaker's rights, by a law of general application.
>
> The most that the Crown can do is to regulate First Nation hunting rights for valid reasons of conservation and safety that will stand up, under the *Sparrow* test, and prohibit the exercise of the right, as being "necessarily inconsistent" with the continued exercise of the right (see para. [272] herein) [omitted]).

> <u>I find the Crown's argument to depend on "bootstrap logic", i.e. there are no rights to be breached because of the very effect of the Crown's action, and to ignore the jurisprudence of *Sparrow* and *Badger et seq*</u>[sic]
>
> *R.* v. *Breaker*, 2000 CarswellAlta 1248 at paras. 437-440. [Emphasis added]

92. The same argument was advanced by Canada in *Mikisew*, *supra*, and was equally unconvincing. In rejecting the argument, Madam Justice Hansen reasoned:

> As an aside, the respondent also advanced the following proposition in these proceedings: the road approval itself amounts to a "taking up" of lands by the Crown. Here, the Minister argues that the First Nations people appreciated there would be encroachment on the lands, therefore, this "taking up" of the road corridor by the Crown would not require justification according to the *Sparrow* analysis. The applicant responds that the "taking up" of lands is not expressly authorized by the treaty – the treaty simply limits the exercise of treaty rights on the land that is taken up. Therefore, in the applicant's view, the taking up of lands is an exercise of Crown authority, subject to the Constitution, and must be justified according to the test in *Sparrow*.
>
> The approach of the Crown forwarded here would render the 1982 constitutionalization of the treaty rights meaningless. It is clear that post-1982, the Crown can not unilaterally defeat treaty rights. This position taken by the Minister cannot be reconciled with the honour and integrity of the Crown as a fiduciary. Finch J. concluded in *Halfway River*, *supra*, at paragraph 136 that it is "...unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a liitation or restriction on the Indians' right to hunt..."
>
> Whether the road approval is characterized as a "taking up" of land or as the imposition of a "shared use", if it is found to constitute a prima facie infringement on the treaty rights of Mikisew, it will have to be justified according to the *Sparrow* analysis.
>
> *Mikisew*, *supra* at pp. 190-191, paras. 84-86.

93. The case law is clear: with the advent of constitutional protection for Treaty and Aboriginal rights, and the elucidation by this Honourable Court in *Sparrow*, *supra*, of the requirements for justification of the infringement of such rights, the Crown cannot and should not be permitted to avoid its duty to consult by citing the "lands taken up" provision of the Treaties.

(iv) *<u>The Alberta Provincial Court decision in Cardinal</u>*

94. Alberta states in its Notice of Motion that it will base its position on the Alberta Provincial Court's

decision in *R.* v. *Cardinal*. The case involved a Treaty 6 hunter charged with unlawfully hunting in a road corridor "wildlife sanctuary". Alberta argued that the "lands taken up" provision of Treaty 6 absolved it from its duty to consult prior to establishing its province-wide system of wildlife sanctuaries. In that decision, the Court determined that the Province was not required to consult where the lands were taken up for a *bona fide* reason: the establishment of a "game sanctuary" for conservation purposes.

> *R.* v. *Cardinal*, (Red Deer, May 23, 2003), Docket No. A07966685G and A0796696G (Alta. Prov. Crt. (Crim. Div.)) [hereinafter *Cardinal*].

95. In his oral decision, Judge Schollie stated that the Crown's duty to consult was fulfilled by the negotiation of the Treaty itself. At page 15, he stated:

> The duty to consult that has been mentioned in this action over the last few days, the documents inform me that the duty to consult was fulfilled by negotiation of the treaty itself, and the subsequent survey of reserves, and the fulfilment of the treaty land entitlement requirement in the treaty.
>
> There's no other requirement to consult in terms of taking up lands for settlement or any other type of purpose.
>
> *Cardinal*, *supra* at p. 15, lines 8-16.

96. This conclusion is clearly erroneous. The duty to consult arises from the fiduciary relationship – not from the Treaty itself. Numerous decisions by this Honourable Court, most significantly those in *Sparrow*, *supra* and *Delgamuukw*, *supra* have indicated that a duty to consult will exist <u>whenever</u> a Treaty or Aboriginal right is *prima facie* infringed. The nature and scope of the duty will vary according to the context of the given case, but the duty itself <u>always</u> exists.

97. The Government of Alberta and the Provincial Court of Alberta's *Cardinal*, *supra* decision fail to grasp the most basic principles of Aboriginal law as is evidenced by their failure to apply the *Sparrow* test. Alberta argued, and the Court held, that *Sparrow* (a case arising out of the non-Treaty, non-NRTA context of British Columbia) did not apply to Treaty rights in an *NRTA* jurisdiction. This determination completely ignores the decision of this Honourable Court in *Badger, supra* where the Court allowed the appeal of a Treaty 8 hunter who had been convicted of unlawfully hunting without a licence in the Province of Alberta. This Honourable Court directed the trial court to apply the *Sparrow* test with respect to the infringement of the accused's Treaty

hunting rights by s. 26(1) of Alberta's *Wildlife Act*.

98. The purpose of post-1982 case law applying s. 35(1), is to prevent the Crown from casually disregarding Treaty and Aboriginal rights claims. The "lands taken up" argument allows the Province to use "bootstrap logic" to avoid the constitutional protections afforded by s. 35(1). Indeed, if successful, Alberta's argument would render Treaty rights weaker than Aboriginal rights, which is a conclusion diametrically opposed to this Honourable Court's ruling in *Badger*, *supra*.

(v) *Summary*

99. Alberta's "lands taken up" argument is contrary to the jurisprudence of this Honourable Court. Further, Alberta relies upon a Provincial Court decision that is clearly in error because it fails to apply that very jurisprudence properly. The critical principle to be gleaned from the above analysis is this: The Crown cannot be allowed to abrogate its duty to consult by characterizing its actions as a "taking up of lands" under Treaty. Given the constitutional protections afforded to Treaty rights, every *prima facie* infringement of these rights must be carefully scrutinized in accordance with the test set out in *Sparrow*, *supra* and *Badger*, *supra*.

V. Conclusion

100. The Crown's fiduciary obligation to First Nations is grounded in history, legislation, prerogative Acts and Treaties, and has been reinforced by the constitutionalization of Aboriginal and Treaty rights. Given the unique relationship created by the Treaties, which Treaty First Nations regard, and the courts have characterized, as sacred and inviolable Nation-to-Nation agreements, the duty of the Crown to consult and accommodate cannot, as British Columbia contends, lie dormant pending definitive proof of a s. 35(1) breach. Inhering as it does in the ongoing relationship between the Crown and First Nations – as embedded in Treaty 8 and affirmed by s. 35(1) – the Province's duty to consult and accommodate is ongoing and pre-eminent. Its existence does not depend on s. 35(1) *per se*, but on the rights and reconciliation of interests that s. 35(1) entrenches. As a Treaty 8 First Nation, Doig has at least an equal claim to the protection of any decision holding the Province of British Columbia to its duty of consultation and accommodation prior to the judicial determination of the existence of the Treaty right.

101. Should, however, this Honourable Court agree with the position put forward by the Appellant, and redefine the nature of the fiduciary relationship between the Crown and First Nations, Doig respectfully submits that such a ruling should be carefully confined in scope. In particular, any decision of this Honourable Court should not prevent Treaty First Nations from holding the Crown to its duty to consult and accommodate where Treaty rights are involved, but before such rights have been established in court.

102. The proceedings before this Honourable Court involve a non-Treaty, Aboriginal rights claim. Therefore, the parties and the courts below have not fully canvassed the impact of the issues on Treaty First Nations. At the very least, Doig submits that, in the case of Treaty First Nations, the question of when the Crown's duty to consult and accommodate arises should be left open. The issues raised are too important to dismiss the potential availability of such arguments to Treaty First Nations except at a hearing before this Honourable Court which is fully informed by specific evidence relating to Treaty.

PART IV - SUBMISSION ON COSTS

103. Doig makes no submissions on costs.

PART V - ORDER SOUGHT

104. In accordance with the foregoing submissions, Doig respectfully submits that this Honourable Court dismiss the Appeal and find that the Crown owes fiduciary and constitutional obligations to consult with First Nations wherever there is the possibility that Crown action or decision-making may infringe Aboriginal interests, whether such interests take the form of Aboriginal rights, title or Treaty rights, prior to the First Nation's rights being judicially determined.

105. In the alternative, should this Honourable Court allow the Appeal by defining the nature of the fiduciary relationship as requested by the Appellants, Doig respectfully submits that such a ruling should be carefully confined in scope. In particular, Doig respectfully requests that this Honourable

Court affirm that nothing in its ruling regarding the Crown's fiduciary duty in the context of asserted but not yet proven Aboriginal rights or title is to be taken as affecting the position of Treaty First Nations in claims concerning the Crown's fiduciary duty owing in the Treaty context.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.
July 24, 2003.

____
JEFFREY R.W. RATH

____
ALLISUN RANA

Counsel for the Intervener,
Doig River First Nation

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3, 4

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20, 96

14

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18, 19, 22, 28, 30, 34, 71

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6, 15, 37, 42, 52, 80, 86, 89, 91

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42, 48, 60, 81, 85, 92

84

LEGISLATION

37

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31

with Schedules 25, 27, 79

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84

35, 38, 77, 87, 93, 96, 97, 99

84

37, 57, 77, 86

84

62

32, 33

PART VII - STATUTES